STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 19, 2011

In the Matter of A. M. BALDWIN, Minor.

No. 300816
Berrien Circuit Court
Family Division
LC No. 2010-000067-NA

In the Matter of A. M. BALDWIN, Minor.

No. 301404
Berrien Circuit Court
Family Division
LC No. 2010-000067-NA

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated cases, respondents appeal as of right the order of the trial court terminating their parental rights to their minor child pursuant to MCL 712A.19b(3)(b)(i), (j), and (k)(ii). We affirm.

Petitioner sought termination of respondents' parental rights after the police learned of a sexually explicit photograph posted on the Internet of the child and respondent-father. The posting identified respondent-father and the child by first name, listed their city and state of residence, and solicited sex with others. When confronted, respondent-father admitted that he had posted the photograph on the Internet. He contended that it was part of his investigation to identify child molesters, and that he planned to turn the evidence over to police when his investigation was complete. Police seized respondent-father's computers and discovered additional photographs of respondent-father and the child naked in sexually explicit poses, as well as photographs of other children. The computer records also revealed Internet chats between respondent-father and others in which respondent-father offered the child for sex.

During the time period in which these activities occurred, respondent-mother lived in the home with respondent-father and the child. Upon questioning by police, respondent-mother admitted that she had in fact taken the photographs. She claimed that she had been forced to take them by respondent-father, though she admitted that he had not used physical force, abuse, or threats with weapons to compel her to participate.

After the child was removed from the home and placed in foster care, she was assessed as being severely educationally and developmentally delayed. Though she was nine years old, she could not read or eat with utensils. She was very fearful, would often have temper tantrums comparable to those of a toddler, and would take off her clothing in public. After being removed from respondents' home, the child began to make progress but, according to the foster care worker supervising the case, the child still had a great distance to go before she could function in society and would require an adult gifted in parenting to help her process the trauma as she grew into puberty and adulthood.

Petitioner sought termination of both respondents' parental rights. Respondents were incarcerated in separate federal facilities outside of Michigan awaiting proceedings on federal criminal charges. The trial court twice adjourned the termination hearing in an effort to locate respondents and arrange for respondents to participate in the hearing. On the third scheduled date for the termination hearing, respondent-mother was able to participate by telephone from the federal facility. Respondent-father, still in federal custody and attending another hearing in another courtroom earlier that day, was able to attend in person, albeit his arrival was delayed. To accommodate respondent-father, the trial court proceeded initially with testimony relevant to respondent-mother until respondent-father arrived. At the conclusion of the termination hearing, the trial court terminated both respondents' parental rights to the child.

On appeal, respondent-father argues that he was denied effective assistance of counsel at trial. We disagree.

The right to due process guarantees the assistance of counsel in child protective proceedings and, therefore, the principles of effective assistance of counsel as developed in criminal law apply to child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 MW2d 506 (2002). To establish a claim of ineffective assistance of counsel, a respondent must show that counsel's performance was deficient, meaning that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation so prejudiced the respondent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *In re CR*, 250 Mich App at 198. To demonstrate prejudice, a respondent must show there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *In re CR*, 250 Mich App at 198.

Contrary to respondent-father's assertions, trial counsel was not ineffective because counsel failed to request the appointment of a guardian ad litem, failed to challenge the trial court's jurisdiction, stipulated to admission of the police officer's report, failed to confront witnesses, or failed to object to testimony being taken before respondent-father arrived at the hearing. First, respondent-father did not demonstrate the need for a guardian ad litem, which was, in any case, discretionary with the trial court. MCR 3.916(A). Second, respondent-father does not contend that jurisdiction was not proper before the trial court; thus, trial counsel cannot be said to have been ineffective for failing to challenge the trial court's exercise of jurisdiction. Third, respondent-father does not explain why the police report should not have been admitted. He therefore fails to establish that trial counsel was ineffective by not objecting to its admission. Fourth, while counsel's examination of the witnesses was not substantial, respondent-father points to no aspect of the testimony that could have been refuted or further discussed so as to

obtain an advantage. The evidence against respondent-father was overwhelming and declining to rehash such devastating testimony on cross-examination may have been strategy by trial counsel. In any event, there is no demonstration that had trial counsel engaged in more vigorous cross-examination, the outcome of the proceedings would have been different. Fifth, trial counsel's actions were not deficient because he failed to object to testimony that had been offered in respondent-father's absence as that testimony was offered with respect to respondent-mother. When respondent-father arrived, he had the opportunity to have the witnesses testify again with respect to respondent-father but chose not to do so. There is no indication that having the witnesses testify again would have affected the outcome of the hearing. In sum, defendant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness and that, but for any errors by counsel, the result of the proceeding would have been different. *In re CR*, 250 Mich App at 198.

We also reject respondent-father's argument that because he was not present for the majority of the termination trial, the order terminating his parental rights must be reversed. A trial court and the petitioner must arrange for a parent incarcerated by the Michigan Department of Corrections to participate in child protective proceedings by telephone. MCR 2.004(A), (C); *In re Mason*, 486 Mich 142, 153; 782 NW2d 747 (2010). However, where a respondent is incarcerated by authorities other than the Michigan Department of Corrections, MCR 2.004 is not applicable. See *In re BAD*, 264 Mich App 66, 71-76; 690 NW2d 287 (2004). Here, at all times during the trial court's proceedings, respondent-father was incarcerated by federal authorities, not by the Michigan Department of Corrections. Consequently, MCR 2.004 was inapplicable. Moreover, the record indicates that respondent-father was not denied the opportunity to be present. While awaiting the arrival of respondent-father at the termination hearing, the trial court agreed to proceed with evidence limited to respondent-mother who was participating by telephone. After respondent-father arrived, trial counsel was offered the opportunity to examine witnesses and give argument. Though not entitled to have his presence ensured by MCR 2.004, respondent-father was present at the portion of the hearing applicable to him.

On appeal, respondent-mother argues that the trial court erred in not appointing a guardian ad litem to protect her interests because she had been declared mentally incompetent by a federal court. We disagree.

In a child protective proceeding, a trial court may in its discretion appoint a guardian ad litem to assist a party. MCR 3.916(A). Whether to make such an appointment is within the discretion of the trial court, as denoted by the use of the word "may" in the court rule. See *In re Humphrey Estate*, 141 Mich App 412, 423; 367 NW2d 873 (1985). Here, respondent-mother did not request that the trial court appoint a guardian ad litem, she was represented by counsel, there is no indication on the record that she did not understand the proceedings, and there has been no demonstration of any event or error before the trial court that might have been averted by the appointment of a guardian ad litem. We find no abuse of discretion by the trial court in not sua sponte appointing a guardian ad litem for respondent-mother.

In addition we reject respondent-mother's contention that she should have been permitted to participate in the termination hearing via video conferencing and not simply by telephone. Respondent-mother argues that because the trial court's September 27, 2010 order of

adjournment specified video equipment as the method for her participation, she was entitled to participate by that method. Though respondent-mother was not guaranteed participation under MCR 2.004 because she was incarcerated in a federal facility, *In re BAD*, 264 Mich App at 71-76, she was permitted to participate by telephone which is deemed sufficient under that rule. Moreover, her attorney agreed to her participation by telephone, and respondent-mother points to no inadequacy in her participation that resulted from participating telephonically. She has not demonstrated any plain error requiring reversal. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly